87-89

Supreme Court, U.S.
FILED
JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DALE E. FOLTZ, WARDEN
Petitioner

vs.

JOSEPH THOMAS
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SIXTH CIRCUIT
COURT OF APPEALS

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County of Wayne

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QUESTIONS PRESENTED

I.

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE SPLIT BETWEEN THE SIXTH AND EIGHTH CIRCUITS AS TO WHETHER AN ACTUAL CONFLICT OF INTEREST ALWAYS EXISTS UNDER CUYLER V SULLIVAN FROM JOINT REPRESENTATION OF SEVERAL DEFENDANTS SIMPLY BECAUSE BUT FOR THE JOINT REPRESENTATION THE SPECULATIVE POSSIBILITY EXISTS THAT COUNSEL COULD SEEK TO HAVE ONE CLIENT OBTAIN A FAVORABLE PLEA IN EXCHANGE FOR TESTIMONY AGAINST THE OTHER DEFENDANTS?

II.

IF AN ACTUAL CONFLICT OF INTEREST CAN BE SAID TO EXIST IN THIS CASE, THEN, AFTER A DEFENDANT HAS PLED GUILTY, CAN AN ADVERSE IMPACT FROM AN ACTUAL CONFLICT BE FOUND WHERE THE PROSECUTOR TESTIFIES THAT HE WOULD NOT HAVE OFFERED THAT DEFENDANT A MORE ADVANTAGEOUS PLEA TO TESTIFY AGAINST THE CODEFENDANTS BECAUSE THE CASE AGAINST THAT DEFENDANT WAS NOT THE "WEAKEST"?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

JOSEPH THOMAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOW COMES Dale Foltz, Warden, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, TIMOTHY A. BAUGHMAN, Chief of the Criminal Division, Research, Training and Appeals, and JANICE M. JOYCE BARTEE, Assistant

Prosecuting Attorney, Appeals, and prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Sixth Circuit of the United States, entered in the above-entitled cause on May 1, 1987.

OPINIONS BELOW

The opinion of the Federal Magistrate Court is appended as Appendix A. The order of the Federal District Court is appended as Appendix B. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on May 1, 1987. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy ... the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner and his two co-defendants, Jeffrey L. Dorsey and Charles A. Perkins, were initially charged with four (4) counts of First-Degree Murder in connection with the December 6, 1974, shooting death of two Detroit residents in their home. The facts elicited at the plea taking on March 12, 1975, indicate that the three co-defendants were present at Dorsey's on December 6, 1974, when they observed that

Dorsey's next door neighbors were leaving their home (T. p.8). Co-defendants entered the house for the purpose of stealing goods (T. p. 10-11). While the Petitioner and his co-defendants were in the house, the two residents and their dog returned to the house and were shot to death (T, p. 16-18, 24). The victims were shot at least 20 times by at least with four different weapons (T, p. 27). A tape recording of a telephone call made by the female decendent just prior to the homicide indicated at least three volleys of shots over a four minute period of time (T, p.27).

Defendants Thomas and Dorsey were arrested first and each had separate counsel at their preliminary examinations on first degree murder charges. Co-defendant Perkins was arrested later and was represented by a third attorney at his preliminary examination.

At the time of the guilty plea in this cause, Petitioner and his co-defendants were represented by Charles Campbell, an experienced criminal attorney who had handled hundreds of felony matters. (Evidentiary Hearing Transcript, p. 42-43; hereinafter EH, p. ___). Campbell had been retained by one of the co-defendants and Petitioner accepted his representation. There was no objection to joint representation.

The plea in this case took place after jury selection but before the presentation of proofs. At this point, Attorney Campbell determined that there was a strong likelihood that all defendants would be found guilty of first degree murder (EH, p.. 32-33). He therefore advised all defendants to accept the prosecution's offer of a plea to second degree murder. As Attorney Campbell explained at the Evidentiary Hearing on this cause:

> "I was all for it, because I felt very strongly that we were all going down, and that would have been true whether we had three lawyers representing three defendants or one lawyer representing

three defendants or even separate trials with Mr. Perkins, the supposedly lease culpable, going to trial himself in a separate trial."

The plea offer, in accordance with the policy of the prosecutor, was conditioned on acceptance by all defendants (EH, p. 6). Attorney Campbell testified that such offer was not subject to negotiation on the eve of trial (EH, p. 54-55).

When the Prosecution was questioned regarding his "all or nothing" policy he indicated as follows:

" There was really no discussion between myself and Mr. Campbell or Mr. Plachta, the two lawyers who represented all three of the defendants. Originally at the pretrial, which had occurred several weeks prior to the day of trial, I had offered each defendant, to allow each

> defendant to plead guilty to two counts of second degree murder. Now, I don't recall what the conversation was at that time, but I can tell you that it would have been my policy, it was always my policy that they all plea or none of them plea."

The prosecutor testified he had only one exception to his "all or nothing" plea policy.

A. "The only exception that I ever had was where a defendant who was less culpable, against whom I had less evidence, if they wanted to plea, leaving me to try the case against that more culpable person against whom I had more evidence, then I would, I would accept a plea of guilty under those circumstance. But if the one against whom I had the stronger case wanted to plead guilty, leaving me to try the case against the weaker -- the person against whom I had less evidence, I would not consider that."

As to the strength of his case against defendant and the co-defendant's, the prosecution stated:

THE WITNESS: Mr. Thomas lived next door to the deceased. Evidence which was taken from the home of the deceased man and his wife was found in Mr. Thomas' home. Evidence which was -- things which were taken from the house were also found in the garage behind the home Mr. Thomas was living in. Other things, specifically a radio and a box with some letters, I believe, were found either in the house or outside of the house Mr. Thomas was living in with Mr. Thomas' fingerprints on them.

The two ladies who were living in that house, one of them was a sister of one of the defendants, and I don't recall which one, testified that there was some discussion regarding a breaking into the house next door and how they were going to go about doing it between the three defendants in the case.

I felt that my case against Mr. Thomas was a fairly strong case.

(With respect to the other defendants in this case)

I felt my case against Mr. Dorsey was just as strong as against Mr. Thomas, but as to Mr. Perkins, who was arrested separately from the other two, and whose preliminary examination was conducted separately from the other two, my case against him, I felt, was substantially weaker because the only evidence that I had against him, that I knew I had against him at that time, was a statement that he made to a civilian regarding his culpability in the event.

Campbell advised each of the co-defendants of the nature of the offense and the possible penalties (EH, p. 44). As the plea transcript reflects, Campbell explained that critical sentencing difference between the principal charge and the plea offer:

> "I have explained the difference between that and first degree Murder and that there is a difference, that this is a parolable offense and that in first degree Murder, it is mandatory life without parole..." (T, p. 4)

Campbell also discussed the only potential defense in this case with the defendants (EH, p. 44). At the Evidentiary Hearing in this case, Campbell testified that he was personally convinced of his client's guilt of the principal offense and believed that the second degree murder plea was the best deal they could get at the moment (EH, p. 44-45).

As acknowledged by the Magistrate in his Report and Recommendation, the participants' memories of the plea bargain discussion in this case "are rather sketchy" (MMR, p. 6). Campbell testified it was necessary to encourage the defendants to accept the plea (EH, p. 34). Petitioner testified that his co-defendants decided to plead guilty first and that his decision was the result of pressure by counsel and the court as well the need for all three to plead to obtain the bargain (EH I, p. 69-70).

Petitioner and his co-defendants testified that both Campbell and Judge Dell Rio pressured them to plead guilty. Campbell, however, testified that defendants were not reluctant to plead guilty but rather held out, as a team, to "...make sure that it was the best we could do..." (EH I, p. 81-82). (Emphasis added).

In any event, the total time devoted to plea discussions was approximately one hour (EH, p. 34). Neither defense counsel Campbell nor Judge Del Rio perceived any potential conflict of interest in this case which would have required separate counsel (EH, p. 44; Del Rio Testimony Transcript, p. 12, 21;; hereinafter DT, p. __).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit found an "actual conflict" based on the inherent dangers which may arise from joint representation and thus found that defendant was denied effective assistance of counsel. Petitioner submits that the Sixth Circuit's holding is in conflict with the Eighth Circuit's holding in United States v Shaughnessy, 782 F.2d 118 (8th Cir. 1986). Petitioner submits that the Sixth Circuit's distinction of Shaughnessy is unfounded. (Shaughnessy held a defendant had not been denied ineffective assistance of counsel even though he had argued inherent dangers which arose from the representation of defendant by an attorney who was retained by a co-defendant. The Court concluded

that defendant had failed to prove that those dangers ripened into an actual conflict of interest.) Further, the Sixth Circuit's holding assumes an actual conflict of interest **always** exists under Cuyler v Sullivan, 446 US 335, 100 SC 1708, 64 L Ed 2d 333 (1980) from joint representation of several defendants simply because but for joint representation the speculative possibility exists that counsel could seek to have one client obtain a more favorable plea in exchange for testimony against the other defendants even where the prosecutor testifies that he would not have offered that defendant a more advantageous plea to testify against the co-defendants because the case against that defendant was not the "weakest". Such a rule would mean that joint representation is never

possible. Moreover, on the facts of this case, no prejudice can be found.

As the statement of the case indicates, defense counsel for defendant also represented two co-defendants. All defendants pled guilty as a result of an "all or nothing plea policy of the prosecutor's[1]." Defendant claimed and the Sixth Circuit Court of Appeals found ineffective assistance of counsel because defendant may have been able to get a more favorable plea agreement if he were represented by separate counsel. In so finding, the Sixth Circuit assumed that a lesser degree of culpability was

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[1] The prosecutor testified that he had a policy which was either all defendant's plead or no defendant pleas. His only exception would be that he sometimes would allow the defendant with the weakest case to plea in exchange for testimony of the other defendants.

synonymous with a "weaker" case (this finding is in direct contradiction to the Prosecutor's testimony that the weakest case was against co-defendant Perkins even though Perkins may have been more culpable).

The record contains no objection to counsel's joint representation and neither defense counsel, who was "unquestionably an experienced criminal attorney,"[2] nor the trial court saw a conflict of interest from the joint representation. Moreover, the actual record "contains no basis for supposing that another lawyer could have negotiated any plea agreement for petitioner in

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2 See dissent by The Honorable Judge Nelson pg. 15.

return for his testifying against co-defendant's"[3]. Contrary to the Sixth Circuit Court of Appeals conclusion that "because of Campbell's joint representation of all three defendants, he was effectively precluded from engaging in any separate plea negotiation on Thomas' behalf which may have been detrimental to the interests of dorsey and Perkins,"[4] the record reflects that it was because of the prosecution's plea policy that defendant was effectively precluded from engaging in separate plea negotiations. Hence defendant had no basis for a separate plea and there is no support for the conclusion that separate counsel could have given him a more favorable plea agreement than that actually arrived at when all three defendants elected to plead guilty to charges of murder in the second degree.

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[3] IBID.

[4] Majority opinion Sixth Circuit Court of Appeals pp. 11.

RELIEF

WHEREFORE, Petitioner submits that for the reasons stated above, Petition for Certiorari should be granted.

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JMJB/hdm

APPENDIX

APPENDIX "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

JOSEPH THOMAS,

Petitioner,

vs.

DALE FOLTZ,

Respondent.

---/

MAGISTRATE'S REPORT AND

RECOMMENDATION

I.

This matter is before me pursuant to Judge Anna Diggs Taylor's Order of Reference dated April 15, 1985, on the following questions:

1. For what reasons did Petitioner plead guilty to second-degree murder on March 12, 1975 in Detroit Recorder's Court?

2. What were the conditions of the plea bargain, if any existed?

3. Why, at sentencing, did defense counsel state: "I would like to remind the court once again that Mr. Thomas did not shoot anybody?" Would he have said anything else or anything differently if he had represented only petitioner and not the two co-defendants as well?

The evidentiary hearing was held in my courtroom on October 9, and November 4, 1985.

II. FACTS

On March 12, 1975, Petitioner pled guilty to two counts of second-degree murder. Mich. Comp. Laws 750.317. He was sentenced by Detroit Recorder's Court Judge James Del Rio to two concurrent terms of forty to one hundred years imprisonment.

On December 6, 1974, Charles Perkins, Jeffery Dorsey, and Petitioner entered the house of Dorsey's next door neighbor to burglarize it. While the three of them were still there, the two victims came back. The two of them were shot at least twenty times with four different weapons from three different

volleys over a period of four minutes. (Sentencing transcript [ST], p. 27). One of them was on the telephone and had dialed 911 when she was shot. Consequently, the actual murders were tape recorded by the police.

Judges and Magistrates are human. Facts like this call very strongly for punishment. But ours is a system of law. Under certain circumstances a higher principle must prevail. For the reasons which follow, I recommend that the petition be granted based on Petitioner's first issue -- but not on his second issue.

Just the day before the three defendants in the present case pled, Judge Del Rio took a plea in another case. The facts are summarized in The Matter of Del Rio, 400 Mich. 665,

701-702, 256 NW2d 727 (1977), appeal dismissed, 434 U.S. 1029 (1978):

> In yet another case, the Commission properly summarized the facts:
>
> Attorney James Howarth testified as to the events of March 11, 1975, in the case of People v Andrew and McHenry Smith. The charge was breaking and entering an automobile, and the prosecuting attorney said there would be no reduced plea. The defendants informed defense counsel and respondent of their emphatic desire to go to trial. Respondent requested the defendants and defense counsel to approach the bench. An ex parte communication ensued, the prosecutor not being present. During the 'negotiations' about taking a plea, respondent expressed the opinion he "was quite certain they would be found guilty." Respondent then sought to interpose himself between the defendants and their attorney saying:
>
> 'I'm street[wise], just like both of you are, and your attorney obviously does not have his shit together, and I think you should be paying no attention to him and you should be entering a plea in this case.'
>
> "The brothers still wanted a trial. Notwithstanding that one of the

brothers was in custody, respondent insisted that Mr. Howarth take his clients out into the hall and explain 'things' to them. When Mr. Howarth returned and informed respondent that the defendants would not plead guilty, respondent berated defense counsel and threatened him with contempt. Respondent again invited the defendants and their attorney to the bench and urged them to plead guilty. Despite extensive criminal convictions, including felonies, respondent promised leniency ('I won't hurt you.') and promised a personal bond if they pled guilty. On the record, however, respondent had defendants acknowledge that no promises were made to them, and their pleas of guilty were thereupon accepted. A personal bond was given the brother in custody pending sentencing. On March 19, 1975, the defendants were each sentenced to three years probation." [Michigan General Court Rule] 1963, 785.7, [now Michigan Court Rule 6.101 requires detailed questioning by the court to establish that a defendant entering a plea fully knows and understands his right to trial before a judge or a jury, and freely and voluntarily waives this right before pleading guilty. Any agreements are to be affirmatively stated on the record. The court is required to ascertain the existence of any coercion. Contrary to all these safeguards, Judge Del Rio himself improperly coerced pleas!

> Furthermore, in the overall handling of guilty pleas, which take up a substantial portion of Recorder's Court activities, Judge Del Rio usurped the function of the prosecution by taking pleas over their objections; interjected extraneous matters into the trial process; appeared to grant probation solely because the defendant took a plea, irrespective of any other consideration; and often interfered with the attorney-client relationship. These and other incidents, to say the least, display improper handling of guilty pleas.

Judge Del Rio was removed from office and disbarred about one year after he took Petitioner's plea.

Petitioner's and co-defendant Dorsey's preliminary examination was held on December 13, 1974. At that time, Petitioner's attorney was Godfrey Dillard. Dorsey's attorney was Milton Henry. Perkins' preliminary examination was held on January 21, 1975. At that time, his attorney was M. Arthur Arduin.

Both Perkins and Betty Perkins, his ex-wife, testified at the evidentiary hearing that soon after Perkins' preliminary examination, Betty Perkins hired Campbell as Perkins' attorney. (Evidentiary Hearing transcript I [EHT I], pp. 19, 94). They did not hire Campbell for either Dorsey or Petitioner.

Both Dorsey and Petitioner testified that Campbell visited them in the Wayne County Jail showing them news clippings of his prior cases. (EHT I, pp. 58-59, 98). Dorsey testified that he thereafter sent Campbell to a friend, Ted Steele (since deceased), for payment. (EHT I, p. 99). Campbell, on the other hand, testified that he did not remember exactly how he came to represent either Petitioner or Dorsey though he believes that he was hired by both. (EHT I, p. 75). Although he testified that he

believed at the time that it was necessary to bring his press clippings with him to client interviews (EHT I, p. 51), he completely denied having solicited any of the defendants (EHT I, pp. 51-52, 80). In the end, however, Campbell represented all three defendants.

Jury selection started on March 12, 1975. Ronald Schigur, the assistant prosecuting attorney who handled the case, testified that a few weeks earlier, at the pretrial conference, he had offered to allow each of the defendants to plead to second-degree murder. (EHT I, p. 6). At the time, they were charged with felony murder. At that time, the Wayne County Prosecuting Attorney's policy was that all defendants had to accept the plea or none would be allowed to plead. (EHT I, pp. 6-7). Campbell

testified that during jury selection, he noticed that the prospective jury was strongly predisposed against his three clients. (EHT I, pp. 29-30). The case had received a lot of publicity. (EHT I, p. 30).

Around noon, Judge Del Rio recessed for lunch. (EHT I, pp 6-7). When Schiqur came back from lunch, he found out that Campbell and Judge Del Rio had worked out a plea bargain.[1] (EHT I, pp. 7-8). Campbell

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1. At that time, judges in Michigan were allowed to participate in plea bargains. Since then, however, they are not allowed to either in Michigan, People v Killebrew, 416 Mich. 189, 330 NW2d 834 (1982), or in the federal courts, Fed. R. Crim. P. 11(e)(1).

corroborated this testimony that Schigur was not involved in the final plea negotiations.
(EHT I, pp. 52-53). Although he was not involved in the final plea negotiations, Shigur assumed that it was a package deal (all three had to plead or none). (EHT I, p. 17).

The participants' memories of what happened during the lunch hour are rather sketchy. Judge Del Rio testified that he remembered very little of the negotiations. (Evidentiary Hearing transcript II [EHT II], p. 14). He did testify, however, that he did not actively involve himself in the plea negotiations nor did he pressure anyone to plead.[2] (EHT II, pp. 16-17). He did not remember if a package deal had been involved, but he stated that it

would not be unusual if one were. (EHT II, pp. 14, 24-26).

Campbell testified that Judge Del Rio demanded that all three or none plead. (EHT I, p. 29, 31-32). He recommended that his clients plead guilty because they would otherwise all be convicted of felony murder. (EHT I, p. 39). None of the three defendants, however, was readily willing to plead. In fact, it took over an hour for Campbell to convince them to plead. (EHT I, p. 34). He testified that he had to pressure

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2. I note that this testimony contradicts the findings of the Michigan Supreme Court cited on pages 3-4 of this Report and Recommendation.

these defendants more than usual to get them to accept the plea bargain. (EHT I, p. 91). He also testified that "part of the spoon feeding [resulted] from the fact that all three had to plead or else there was no package, or no deal." (EHT I, p. 92). He could not remember, however, if any one of the three was more reluctant than the others. (EHT I, p. 83). Instead, the three were asking whether they could get a better deal. (EHT I, p. 84). He did remember, on the other hand, that he specifically explained to all three that all had to plead or none could plead. (EHT I, p. 55).

Dorsey testified that he was the first to become convinced to plead guilty. (EHT I, p. 100). He believed that if he did not plead, he would be found guilty anyway. (EHT I, p. 100. He

did not remember, however, which of the other two next decided to plead. (EHT I, p. 100). He did, however, testify that the plea bargain was a package deal. (EHT I, p. 100). He told the other two that if they did not plead, he would not be able to. (EHT I, 102). He also testified that, at one point, Judge Del Rio entered the room where Campbell and the three defendants were talking and told Dorsey to help his lawyer to convince the others to plead. (EHT I, p. 102).

Perkins testified that he was the next defendant to agree to plead. (EHT I, p. 96). He explained why he decided to plead: "That they weren't going to let us beat it, regardless if we went to trial on it or not. The judge just wouldn't let it be if only I would take this cop." (EHT I, p. 97).

In contrast to Dorsey and Perkins, Petitioner testified that he decided to plead, at least in part, because all three were necessary for a bargain. (EHT I, p. 70). He testified that he did not believe that he was guilty of the crime charged. (EHT I, p. 62). At his sentencing, he had told Judge Del Rio that he, unlike the other two, had not shot anyone and that he did not steal anything. (ST, pp. 34-35). He further testified that what he had said to establish the factual basis for the plea was not true. (EHT I, p. 65).

He corroborated the others in testifying to the existence of a package deal. He said that Campbell told him that the plea would not be accepted unless all three agreed. (EHT I, p. 68). In the end, he felt that he was forced to

enter the plea due to pressure from both Campbell and Judge Del Rio. (EHT I, p. 69).

In 1981, Perkins filed a petition for writ of habeas corpus with this Court. Civil Action No. 81-71337. Eventually, the case was referred to me for an evidentiary hearing which was held on March 1, March 9, and May 13, 1982. Perkins alleged that he and the others had pled guilty because Judge Del Rio had promised leniency if they pled. They were to plead guilty to second-degree murder and would ostensibly receive a stiff penalty. However, the stiff penalty was for public consumption only. Judge Del Rio promised to review the sentence about three years later. In my Report and Recommendation dated December 15, 1982, I specifically found that Perkins'

plea "was significantly induced by the representations that his case would be reviewed in a few years by a judge." P. 2. Accordingly, I recommended that the petition be granted. This recommendation was not followed, however, though the facts were specifically adopted. In an opinion dated January 12, 1983, the petition was denied. The Sixth Circuit affirmed on April 6, 1984. 734 F2d 15 (6th Cir. 1984).

III. STANDARD OF REVIEW

The Supreme Court has never explicitly articulated the precise standard for reviewing a claim that a guilty plea was involuntary due to a conflict of interest. Consequently, I must look to the Supreme Court's pronouncements on analogous claims to determine the correct standard.

The standard for determining the effective assistance of counsel is found in Strickland v Washington, ___US___, 104 SCt 2052, 2064 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The standard is a little different, on the other hand, when a guilty plea is involved. In that situation, although the first prong is the same, the second prong is different. The defendant must show not only that his counsel acted

ineffectively, but that there is a reasonable probability that but for his errors he would not have pled guilty and would have insisted instead on proceeding to trial. Hill v Lockhart, US__, 106 SCt 366 (1985).

As is seen from the above, the standard for the ineffective assistance of counsel requires prejudice. Prejudice, however, is not quite as necessary where the claim is conflict of interest. In fact, conflict of interest claims use a standard closer to a per se rule or reversal. The standard for a conflict of interest claim is found in Cuyler v Sullivan, 446 US 911 (1980). It is summarized in Strickland, supra, 104 SCt at 2067:

> In Cuyler. . ., the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps, the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflict,...it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [e.g., actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interest" and "that an actual conflict of interest adversely affected his lawyer's performance."

In other words, "the Cuyler test directs us to determine, on the fact of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the

provisions of the Sixth Amendment..." Smith v Bordenkircher, 671 F2d 986, 987 (6th Cir. 1982), cert. denied, 459 US 848 (1982). See also Dixson v Quarles, 781 F2d, 535 (6th Cir. 1985), affirming, F. Supp.___, No. 84-CV-4957-DT, E.D. Mich., March 12, 1985.

Just as the Strickland standard was adapted in Hill to fit the guilty plea situation, so too must the Cuyler standard be adapted. As stated in Tollett v Henderson, 411 US 258, 267 (1973), "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." The question is whether the plea was "a voluntary and intelligent...choice among the alternative courses of action open to [the defendant] at the time the plea was entered." North Carolina v Alford, 400

USD 25, 31 (1970). In other words, an actual conflict of interest is irrelevant if the plea was in fact voluntary. See generally, Boykin v Alabama, 395 US 238 (1969); Campbell v Marshall, 769 F2d 314 (6th Cir. 1985).

Accordingly, the proper standard for the present case is two-pronged. First, was counsel actively representing conflicting interests? Second, was the defendant's decision to plead affected by counsel's advice which stemmed from the conflict?

IV. DISCUSSION

Respondent contends that Petitioner has shown neither an actual conflict nor any actual conflict adverserly affecting his lawyer's performance. He first argues that there was no conflict

because, "[o]nce one co-defendant decided to plead guilty, the all-or-nothing plea policy of the prosecution would have placed pressure on the remaining defendants regardless of joint or separate representation." Moreover:

> Petitioner here was presented with a simple choice: plead guilty to second degree murder and hope for leniency in sentencing or proceed to trial and face the strong probability of conviction for first degree murder for a mandatory life offense. There is no claim or support for the conclusion that counsel's advice to plead guilty was incompetently based on an erroneous assessment of the case or likely outcome of trial. Nor does Petitioner claim that he lacked understanding of the charges, nature of the offense, or his right to proceed to trial.

Judge Del Rio testified that he did not inquire about a potential conflict because it did not even occur to him that there may have been one. (EHT II, p. 12). Petitioner testified that Campbell did not explain the potential for conflict to him. (EHT I, p. 61).

Campbell, on the other hand, testified that he probably discussed a potential conflict with his three clients. (EHT I, p. 50). On the other hand, the believed that there was no actual conflict. (EHT I, p. 50). He testified that it was best for all defendants to stay with him as their attorney. (EHT I, p. 83). He also testified that he did not agree with the represent conflict of interest rules. He said that these rules merely make it easier for the prosecution to divide its opposition and thus prevail. (EHT I, p. 85)[3].

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3. I note that since the plea in the present case, both Michigan and the federal government have enacted rules requiring the trial court to affirmatively inquire for a conflict into any instance of joint representation. Michigan Court Rule 6.101(c); Fed. R. Crim. P. 44(c).

Despite Campbell's and Del Rio's assessment, however, there was a conflict of interest. Schigur testified that he actually would have considered accepting a plea from one defendant if that defendant agreed to testify against the other two. (EHT I, p. 11). Campbell, however, testified that he would not have offered Thomas to testify against the others: "I would not have used Charles Perkins' liberty or Jeffery Dorsey's liberty or Joseph Thomas' liberty that way. It would have been grossly unfair of me to do that. I'm surprised that you asked me that." (EHT I, p. 29).

Campbell correctly assessed that under the circumstances, offering one defendant against the other two would have created an actual conflict which would have adversely affected his representation of his other two clients.

Ruffin v Kemp, 767 F2d 748 (11th Cir. 1985). On the other hand, however, the converse is also true. The fact of joint representation alone does not per se amount to a conflict of interest. Holloway v Arkansas, 435 US 475, 482 (1978). Furthermore, under normal circumstances, the prosecution does not act improperly demanding a "package deal." The conflict arises, however, when a package deal is demanded of defendants who are represented by the same attorney. Thus, the contingent nature of the plea agreement in the present case (the package deal) combined with the multiple representation resulted in an actual conflict. Walker v Garrington, 521 F. Supp. 1313 (M.D. Tenn. 1981).

In Walker, the trial attorney represented two co-defendants. The

prosecution's offer was contingent on both defendants pleading guilty. Although the petitioner wished to plead guilty, his co-defendant refused. The Court in Walker ruled that an actual conflict existed. Because of the joint representation, the trial attorney could not offer the petitioner to testify against the co-defendant:

> He could not attempt to obtain a better deal for Walker or avoid the contingency nature of the offer by tendering Walker's testimony against Brock, nor could he provide professional advice concerning acceptance or rejection of the plea offers. Clearly, each defendant had different interests to consider in deciding whether to accept the plea agreement. Yet, an attorney in Mr. Hoats' position could not fully advise each defendant regarding these interests without fear that a decision to plead or not to plead could put subtle pressure on the other defendant.

The same conclusion was also reached in Bishop v Parratt, 509 F. Supp 1140 (D. Neb. 1981). There, a public defender

named William Campbell represented the three defendants. The trial judge offered to accept a guilty plea but only if all three decided to plead. The other two readily agreed but petitioner held out for a while before he also agreed. The court specifically found a conflict or interest. William Campbell did not, and could not, explore the possibility of having one plead guilty without the other pleading. Id. at 1148. This situation occurred because of the requirement that either all or none plead.

In addition to placing pressure on the attorney to forego plea bargaining situations, the present situation constituted an actual conflict because the attorney may have found it necessary to put pressure on the more reluctant defendants to obtain the bargain for all of them. In United States v Truglio, 493

F2d 574 (4th Cir. 1974), one attorney represented all five defendants. In addition to a requirement that all five agree, the charges were going to be totally dismissed against two of them, but not against the defendant. The Fourth Circuit found an actual conflict: "It is quite understandable that having obtained what he considered to be a favorable bargain for all of the defendants [trial counsel] would be somewhat more reluctant to see the bargain collapse in its entirety by Truglio's insistance that the trial continue." Id. at 580.

As stated above, however, the existence of an actual conflict does not by itself warrant relief. "A client's voluntary decision to plead guilty may coincide with the preference of his lawyer arising from a multitude of

personal considerations." Lace v United States, 736 F2d 48, 50 (2d Cir. 1984). Therefore, a plea is still voluntary (and therefore valid) where the conflict of interest did not affect the plea. Dukes v Warden, 406 US 250 (1972); Kibert v Blankenship, 611 F2d 520 (4th Cir. 1979), cert. denied, 446 U.S. 911 (1980); Boehmer v United States, 414 F.Supp. 766 (E.D. Pa. 1976). Accordingly, in United States v Laura, 667 F.2d 365 (3d Cir. 1981), a majority found that the plea was voluntary even though the defendant and her husband (a co-defendant) were represented by the same counsel and the prosecution had agreed to a plea bargain only if both of them pled. The Third Circuit found that the attorney's advice was not relayed in a coercive manner nor did he suggest a course of action. In other words, he merely informed her of the probable consequences and did not

actually coerce her into pleading guilty. Id. at 370-371.

The present situation is unlike Laura, however. Petitioner's decision to plead guilty was substantially affected by Campbell's advise which was burdened by an actual conflict. Granted, by pleading guilty, Petitioner received substantial benefits. In Michigan, a person convicted of felony murder is never eligible for parole. Armstrong v Egeler, 563 F.2d 796, 797 (6th Cir. 1977); Richardson v Hatch, 134 F.Supp. 110, 112, n.1 (W.D. Mich. 1955). Such a prisoner may legally leave the prison before death only if the governor commutes his sentence. On the other hand, a prisoner receiving a life sentence for second-degree murder is eligible for parole after 10 years. People v Johnson, 421 Mich. 494, 364 NW2d

545 (1985); Mich. Comp. Laws 791.234(1). Accordingly, if Petitioner decided to plead guilty to get the benefits of the plea bargain, his plea was in fact voluntary because the actual conflict did not adversely affect the lawyers' performance.

This is not what happened in the present case, however. I specifically find that one of the substantial reasons why Petitioner pled guilty was because of Campbell's pressure on him to plead. This pressure was placed on him because of Campbell's desire not to see the agreement for the other two collapse. If Petitioner did not plead, none of them would have obtained the benefits of the bargain. "A defendant, in deciding whether to plead guilty, is entitled to the advice of an attorney untrammeled by conflicting interests." United States ex

rel. Taylor v Rundle, 305 F.Supp. 1036, 1040 (E.D. Pa. 1969). Moreover, "in making such decisions [whether or not to plead], petitioner is entitled to the loyal and zealous assistance of independent counsel." Mone v Robinson, 430 F. Supp. 481, 488 (D> Conn. 1977), aff'd., 573 F.2d 1293 (2d Cir. 1977).

The decision to plead guilty (or not to plead guilty, no matter how ill-conceived) is the defendant's own personal choice. Even though the decision to plead to second-degree murder in the present case was obviously beneficial to Petitioner (and perhaps the only intelligent thing to do), that decision is his and not his attorney's. This is not to say that Petitioner would not have pled if he had had separate counsel. Cuyler does not require that determination. Instead, when the plea

has been tainted by the advice of counsel whose advice stemmed from an actual conflict, the decision to plead is not voluntary and must be vacated.

V. SENTENCING

On the other hand, I conclude that the actual conflict did not adversely affect Petitioner at his sentencing. At the sentencing, Judge Del Rio asked Campbell if he had anything to say on Petitioner's behalf. In response, Campbell said, "I would like to remind the Court once again that Mr. Thomas did not shoot anybody." (ST, p. 34).

It is a lawyer's duty to convince the judge to sentence leniently. Wood v Georgia, 450 U.S. 261 (1981). A subsequent sentence may be invalid because of the attorney's conflict of

interest. United States v Geittmann, 733 F.2d 1419 (10th Cir. 1984).

Petitioner argues that Campbell did not sufficiently argue his lesser degree of culpability at the sentencing. Thus, the actual conflict adversely affected the representation at sentencing.

I disagree. Campbell testified that he presented all the mitigating circumstances for Petitioner at the sentencing. (EHT I, p. 40). How much the mitigating circumstances are to be stressed and how much should be spoken is a question of strategy. Petitioner has not shown that but for his representation for Dorsey and Perkins, Campbell would have said more on Petitioner's behalf at sentencing.

In fact, the conflict could not have

hurt Petitioner. By the time Campbell spoke on his behalf, both Dorsey and Perkins had already been sentenced. Since judge Del Rio would not likely have vacated his sentences (and imposed higher ones) against Dorsey and Perkins based on what Campbell said on Petitioner's behalf, Campbell had nothing to gain on Perkins' and Dorsey's behalf by not sufficiently emphasizing Petitioner's lesser culpability. As it turned out, Petitioner received a lower sentence.

Whereas he received 40 to 100 years, both Perkins and Dorsey received 50 to 100 years.[4] In People v Gjidoda, 140 Mich App 294, 364 NW2d 698 (1985), the Michigan Court of Appeals found that "sending a message to a segment of the Albanian community" as a factor in sentencing violated the defendant's

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4. At the evidentiary hearing, Judge Del Rio testified as follows:

> I did not discuss this particular case with [Recorder's Court] Judge [Henry] Heading, but I knew that at other times when we had conversations, before and after the bench meetings, that he as well as myself had made up our minds that depending upon the particular crime and circumstances of it, we were going to send a message back to the black community to stop this kind of senseless killing in connection with considerations I took when I sentenced these particular individuals under the circumstances of this robbery and [these killings].

(EHT II, p. 26).

Fourteenth Amendment equal protection rights. I, however, am unable to make a recommendation on this issue because it has not been exhausted.

VI. SUMMARY

I recommend that the petition for writ of habeas corpus be **GRANTED** based on the first issue and **DENIED** on the second.

The parties are hereby informed that objections may be filed to this Report and Recommendation within 10 days of receipt of a copy thereof as provided for in 28 U.S.C. 636(b)(1)(C) and that failure to file objections may constitute a waiver of any right to appeal. United States v Walters, 638 F2d 947, 950 (65th Cir. 1981), states that "a party shall file objections with the district court

or else waive right to appeal." See also Thomas v Arn, ___U.S.___, 106 SCt. 466 (1985).

LYNN V. HOOE
UNITED STATES MAGISTRATE

DATED: 3-13-86

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH THOMAS,
Petitioner,

Civil Action No.
84 4740

-vs-

DALE FOLTZ,
Respondent.

ORDER

The court having reviewed the Magistrate's Report & Recommendation and the objections thereto submitted in the above captioned case, and being otherwise fully apprised in the premises,

IT IS ORDERED that the Magistrate's Report and Recommendation is hereby adopted and entered as the findings and conclusions of the court.

IT IS FURTHER ORDERED that a conditional writ of habeas corpus is hereby granted. Unless a date for a new trial is scheduled within ninety days, Petitioner must be unconditionally released.

IT IS SO ORDERED.

ANNA DIGGS TAYLOR
United States District Court

Dated: July 7, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH THOMAS,
Petitioner,

Civil Action No.
84 4740

-vs-

DALE FOLTZ,
Respondent.

JUDGMENT

The above-entitled matter having come before the court on a Petition for a Writ of Habeas Corpus, Honorable Anna Diggs Taylor, United States District Judge, presiding, and in accordance with the Order entered on July 7, 1986,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is granted.

IT IS FURTHER ORDERED that unless a date for a new trial is scheduled within ninety day, Petitioner must be unconditionally released at that time.

IT IS SO ORDERED.

_____

ANNA DIGGS TAYLOR
United States District Judge

Date: July 7, 1986

APPENDIX "C"

NO. 86-1706

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH THOMAS,
Petitioner-Appellee,

v

DALE E. FOLTZ,
Respondent-Appellant

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed May 1, 1987

Before: MARTIN and NELSON, Circuit Judges; and CONTIE Senior Circuit Judge.

CONTIE, Senior Circuit Judge, delivered the opinion of the court, in which MARTIN, Circuit Judge, joined. NELSON, Circuit Judge, (pp. 15-17) delivered a separate dissenting opinion.

CONTIE, Senior Circuit Judge. Dale E. Foltz, warden of the state prison in Jackson, Michigan, appeals from the judgment of the district court granting Joseph Thomas' petition for a writ of habeas corpus pursuant to 28 U>S>C> para. 2254. Appellant challenges the finding made below that the counsel who represented Thomas at a plea proceeding was ineffective because there was an actual conflict of interest which adversely affected the representation of Thomas. For the reasons which follow, we affirm the grant of the writ.

I.

In 1975, petitioner Thomas and two codefendants, Jeffrey Dorsey and Charles Perkins, were indicted on charges of first degree murder under Mich Comp. Laws Ann. para. 750.316 in connection with the December 6, 1974 shooting deaths of two Detroit residents in their home. On December 6, 1974, Thomas and Perkins were present at Dorsey's house when Thomas observed Dorsey's neighbors leaving their home. Thomas, Dorsey and Perkins then entered the neighbors' home with plans to burglarize it. While they were in the house, the residents returned and were shot to death. The female resident called the police emergency number before she and her husband were shot; thus, the shooting was tape-recorded. There were at least three different volleys within a

four minute period, during which the victims were shot at least twenty times by at least four weapons.

After all three defendants were arrested, Perkins' wife hired Charles Campbell to represent Perkins. She did not hire Campbell to represent either of the other two defendants. Campbell subsequently visited Thomas and Dorsey in the Wayne County Jail and showed them news clippings about his prior cases. Dorsey retained Campbell as his counsel and arranged to have a friend pay Campbell. Thomas later also accepted Campbell's representation, although he did not personally retain Campbell. The defendants made no objection concerning the joint representation.

Campbell later stated that it was his practice to bring his press clippings with him to client interviews. Although he did not recall how he came to represent Thomas and Dorsey, Campbell expressly denied having solicited either of them. Nonetheless, Campbell in fact represented all three codefendants.

At the pretrial conference held several weeks prior to jury selection, the assistant prosecutor who handled the case, Ronald Schigur, offered to reduce the charges to second degree murder if each of the defendants agreed to plead guilty. Schigur's policy was to always require that all the defendants accept the plea agreement as a package deal; if any one of the defendants did not plead,

none were permitted to enter a plea individually. No action was taken on the plea offer at that time.

Jury selection began on March 12, 1975. During selection, Campbell observed that the jury appeared to be predisposed against the defendants. The case had, in fact, been highly publicized in Detroit.

After the jury was selected, Judge Del Rio, then a judge of the Recorder's Court of Detroit, recessed for lunch. During the recess, Campbell discussed with Judge Del Rio the possibility of all three defendants pleading guilty to the lesser charges of second degree murder. According to Campbell, Judge Del Rio demanded that all three defendants plead;

otherwise, none would be permitted to plead. Schigur was not privy to the discussion, since he had left when the court recessed.

Campbell then discussed with the defendants the possibility of entering guilty pleas, and recommended that they do so. Neither Thomas nor the other defendants were initially willing to plead. In fact, it took Campbell "perhaps an hour ...to encourage them to plead guilty." Campbell acknowledged that he "had to lean on the defendants" much more than usual, but he believed that the defendants had no practical alternative but to plead guilty. He absolutely did not consider making an offer of having one of the defendants, such as Thomas, testify against the other

two. According to Campbell, that would have been "grossly unfair," since he was representing all three defendants. Neither Campbell nor Judge Del Rio perceived any potential conflict of interest problems.

According to defendant Dorsey, he was the first to agree to plead guilty; Campbell had convinced him that if he did not plead, he would be found guilty anyway. Dorsey acknowledged that for a time he was the only one to agree to plead and that he attempted to convince the other two defendants to plead as well, since he knew it was a "package" deal. Dorsey remembered Judge Del Rio entering the room where the plea discussions were taking place and

instructing him to convince the other defendants to plead guilty. Judge Del Rio purportedly said that the defendants could not escape conviction due to the publicity. Judge Del Rio also stated that although he would be compelled to initially impose harsh sentences as a

result of the extensive publicity, he would reconsider the sentences in a few years.[1]

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[1] This court expressly acknowledged that Judge Del Rio made this statement in a previous unpublished decision involving an appeal brought by codefendant Perkins. See Perkins v. Mintzes, 734 F.2d 15 (6th Cir. 1984) (per curiam). In Perkins, this court reviewed the district court's denial of Perkins' petition for a writ of habeas corpus. Perkins had sought habeas relief on the ground that Judge Del Rio's representation improperly induced his guilty plea. This court upheld the denial of Perkins' petition, finding that although Judge Del Rio's remarks were highly improper, they did not deprive Perkins' guilty plea of its voluntary, and therefore constitutional, nature. The issue of ineffective counsel due to a conflict of interest was not before the court.

Perkins remembered that he was the next defendant to agree to plead. Based on Campbell's representation, he believed that he and his codefendants could not escape convictions of guilty, whether or not they went to trial.

Thomas was the last to plead guilty. According to Thomas, his decision to plead was based in part on the knowledge that pleas from all three defendants were necessary for the plea bargain. He also believed that he was forced to enter the plea by Campbell and Judge Del Rio.

When assistant prosecutor Schigur returned at about 2:00 p.m., Campbell announced in open court all three defendants would plead guilty to second degree murder. Thus, on March 12, 1975,

all three defendants entered pleas of guilty in the Detroit Recorder's Court to the reduced charges of second degree murder.

On March 19, 1975, Judge Del Rio held a plea and sentencing hearing at which Campbell explained that he had fully informed the defendants of the nature of their pleas. He further stated that he had explained to the defendants that the critical difference between first and second degree murder under Michigan law is that second degree murder is a parolable offense while first degree murder invokes a mandatory life sentence without parole.

All three defendants also testified at the hearing. Thomas testified that although he was in the house and was carrying a gun when the shootings occurred, he did not shoot anyone.[2] In fact, Thomas claimed that he did not fire a shot. Campbell reiterated this fact in a closing comment to the court. Judge Del Rio subsequently sentenced Thomas to two concurrent terms of forty to one hundred years in prison.

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[2] In their testimony, Dorsey admitted shooting the woman in the house and Perkins admitted shooting the man.

Thomas pursued all possible avenues of appeal, with the Michigan Supreme Court twice denying his petitions for leave to appeal to that court. Thomas thereafter filed, on October 15, 1984, the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. para. 2254. As grounds for relief, Thomas alleged that he was denied effective assistance of counsel when Campbell represented him and his codefendants at both the guilty plea and sentencing proceedings. Thomas also alleged exhaustion of all available state remedies.

The case was referred to a magistrate who held evidentiary hearings at which defense attorney Campbell, defendants Thomas, Perkins, Dorsey, assistant prosecutor Schigur and Judge Del Rio all

testified. On March 14, 1986, the magistrate issued an extensive Report and Recommendation recommending that the petition be granted as to Thomas' claim of ineffective assistance of counsel. The magistrate determined that Campbell was ineffective because there was an actual conflict of interest which adversely affected his performance as Thomas' independent counsel. According to the magistrate, the combination of the contingent plea agreement and the multiple representation of all codefendants created the actual conflict. Specifically, the magistrate found that an actual conflict existed because Campbell "may have thought it necessary to put pressure on the more reluctant defendants to obtain the bargain for all of them." The magistrate also believed that the "all or nothing" plea offer may

have caused Campbell to forego the possibility of having one defendant plead guilty without the others pleading. With regard to whether the conflict affected Campbell representation, the magistrate concluded that it had, finding that Campbell's pressuring to obtain a united plea was one of the "substantial reasons" Thomas pled guilty.

After objections were timely submitted, the district court entered an order on July 8, 1986, adopting the magistrate's Report and Recommendation and granting a conditional writ of habeas corpus. The order provided for Thomas' unconditional release from custody if a new trial date was not scheduled within ninety days. Respondent Foltz then brought this timely appeal from the district court's order.

II.

We must determine whether Thomas was denied effective assistance of counsel due to a conflict of interest, where his attorney jointly represented all the defendants, the defendants were presented with an "all or nothing" plea agreement, and Thomas was reluctant to accept the agreement but was persuaded to do so by counsel.

The starting point for analyzing a claim of ineffective assistance of counsel is the two-pronged standard set forth in Strickland v Washington, 466 U.S. 668, 687 (1984). Under that standard, a criminal defendant must show both that his counsel's performance was deficient and that it prejudiced his

defense in a manner which deprived him of a fair trial. Meeks v Bergen, 749 F.2d 322 (6th Cir. 1984). This standard is adjusted, however, when dealing with a situation where a defendant enters a guilty plea instead of being found guilty after a trial. In the context of guilty pleas, the first element, the "performance" aspect, of the Strickland test remains the same but the second element, the "prejudice" requirement, changes. "[I]n order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v Lockhart, 106 S. Ct. 366, 370 (1985).

The instant case involves a specific type of ineffectiveness claim, that of conflict of interest, which is also examined under a sightly different standard from that used in a traditional ineffectiveness claim. The Supreme Court set forth the standard for determining conflict of interest cases in Cuyler v Sullivan, 446 U.S. 335 (1980), and summarized it again in Strickland as follows:

> In Cuyler...[we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties.

Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trials courts to make early inquiry in certain situations likely to give rise to conflicts...it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the

> defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

Strickland, 466 U.S. at 692 (emphasis added) (quoting Cuyler, 466 U S. at 350, 348). This Circuit has interpreted the Cuyler test as directing courts "to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment...." Smith v Bordenkircher, 671 F.2d 986, 987 (6th Cir.), cert. denied, 459 U.S. 848 (1982).

Just as the Strickland standard has to be adapted to the guilty plea context, so must the Cuyler standard be adapted. The primary question in the guilty plea context is whether the plea was a "voluntary and intelligent choice" made by the defendant. North Carolina v Alford, 400 U.S. 25, 31 (1970). Thus, in order to successfully assert a claim of ineffective counsel based on a conflict on interest, a defendant who entered a guilty plea must establish: (1) that there was an actual conflict of interest, Smith, 671 F.2d at 987; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the

defendant.[3] These are the two questions which face this court.

A. Actual Conflict

The standard for determining whether an actual conflict of interest exists was set forth in United States v Mers, 701 F.2d 1321 (11th Cir.), cert denied, 464 U.S. 991 (1983), as follows:

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[3] It bears repeating that this second element carries with it a level of presumed prejudice and does not require a showing of prejudice as required under Strickland; it imposes the lesser burden of having to prove some adverse impact.

We will not find an actual conflict unless appellants can point to "specific instances in the record to suggest an actual conflict or impairment of their interests"...Appellants must make a factual showing on inconsistent interests and must demonstrate that the attorney "made a choice between possible alternatives courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical."...There is no violation where the conflict is "irrelevant or merely hypothetical"; there must be an "actual significant conflict."

Id. at 1328 (citations omitted).[4] The appellant contends that this standard has simply not been met.

Joint representation of codefendants does not per se constitute ineffective assistance of counsel due to a conflict of interest. See Kibert v Blankenship, 611 F.2d 520, 526 (4th Cir. 1979), cert

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[4] In Dixson v Quarles, 627 F. Supp. 50 (E.D. Mich. 1985), the district court utilized this standard. On appeal, this court approved the district court's holding and analysis under that standard. Dixson v Quarles, 781 F.2d 534 (6th Cir. 1985), cert. denied, 107 S. Ct. 411 (1986).

denied, 446 U.S. 911 (1980). The Supreme Court has observed, however, that a conflict of interest stemming from multiple representation may prevent an attorney "from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution." Holloway v Arkansas, 435 U.S. 475, 490 (1978). Campbell acknowledged that his multiple representation indeed caused him to forego this exact type of potential plea negotiations. He stated that he would not have considered offering one of the defendants, such as Thomas, to testify against the others in exchange for a more favorable plea agreement because that would have been "grossly unfair" under

the circumstance.[5]

The Fifth Circuit has stated that foregoing such plea negotiations is proof of an actual conflict of interest. In Baty v Balkcom, 661 F.2d 391 (Former 5th Cir. 1981), cert. denied, 456 U.S. 1011 (1982), an attorney represented both codefendants in the pretrial stage of proceedings during which the state offered a plea agreement. Neither defendant was able to successfully complete a deal,

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[5] Assistant Prosecutor Schigur testified at the magistrate's evidentiary hearing that he would have considered accepting a plea from a single defendant under those conditions.

however. The court stated that an actual conflict of interest existed before trial because had the attorney "not been facing a conflict of interest, [he], might have been able to negotiate a plea agreement on [the petitioner's] behalf in return for becoming a prosecution witness against the [codefendant]." id. at 397. This analysis is equally applicable in the present case.

We also find the instant situation analogous to that presented in Ford v Ford, 749 F.2d 681 (11th Cir.), cert denied, 106 S. Ct. 278 (1985). In that case one attorney represented two codefendants, who were brothers. The state was willing to enter into a plea agreement with the brothers but only if both pleaded guilty. One of the brothers

wanted to plead guilty while the other wanted to go to trial. On the day of the trial, the latter brother changed his mind and both pleaded guilty. In reviewing a habeas petition brought by the brother who had initially desired to go to trial, the Eleventh Circuit found that there was an actual conflict, because it was "obvious that the brothers' attorney was placed in a position of divided loyalties." Id. at 682.

There was also an actual conflict of interest in the instant case, since there were competing interests at stake which attorney Campbell could not pursue due to his joint representation and the "all or nothing" nature of the plea agreement.

Because of Campbell's joint representation of all three defendants, he was effectively precluded from engaging in any separate plea negotiations on Thomas' behalf which may have been detrimental to the interests of Dorsey and Perkins. Furthermore, in order to obtain the benefit of the plea agreement for Dorsey and Perkins, Campbell found himself in a position where he needed to place pressure on Thomas to also accept the plea agreement. While we recognize that joint representation does not alone constitute inefffective assistance of counsel due to conflict of interest, Kibert, 611 F.2d at 526, and that is not necessarily improper for counsel to advise a defendant to plead guilty in a manner consistent with codefendants, Dukes v Warden, 406

U.S. 250 (1972), we believe that the combination of factors in the instant case created an actual conflict of interest.

B. Adverse Effect

As we recognized above, the existence of an actual conflict will not alone support a finding that Campbell was constitutionally ineffective.[6]

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[6] But see Baty v Balkcom, 661 F.2d 391, 396-97 (Former 5th Cir. 1981), cert. denied, 456 U.S. 1011 (1982) (holding that habeas petitioner need not demonstrate adverse effect on representation but need only prove an actual conflict to justify habeas relief on account of a conflict of interest).

In addition, there must be evidence that Campbell's conflict adversely affected the voluntary nature of Thomas's guilty plea. There need not, however, be a showing of prejudice as normally required under Strickland; rather, if the defendant is able to demonstrate that a conflict of interest had an adverse impact on the voluntariness of his guilty plea, prejudice will be presumed. See Strickland, 466 U.S. at 692; Cuyler , 446 U.S. at 349-50.

[6] (cont) This holding of Baty has since been questioned, however, in light of the Supreme Court's subsequent statements in Strickland. See Ruffin v Kemp, 767 F.2d 748, 751 n.6(11th Cir. 1985).

"[I]n a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing...." Holloway v Arkansas, 435 U.S. 475, 490 (1978) (emphasis in original). In the instant case, once Dorsey and Perkins informed Campbell that they desired to plead guilty, Campbell was compelled to refrain from advising Thomas not to plead since doing so would have caused the collapse of the plea agreement to the detriment of Dorsey and Perkins. Furthermore, once Campbell obtained the commitments of Dorsey and Perkins, he was compelled to refrain from seeking a separate deal for Thomas by offering Thomas to testify against Dorsey and Perkins. Since an independent counsel would not have had those

concerns, we find that Campbell's conflict had an adverse impact on his representation.

Also, in determining that Campbell's conflict had an adverse impact on the voluntariness of Thomas' plea, the magistrate below explicitly found that "one of the substantial reasons [Thomas] pled guilty was because of Campbell's pressure." According to the magistrate, this pressure resulted from Campbell's desire to prevent the plea agreement from collapsing. We find this analysis persuasive and agree that Campbell's actual conflict adversely affected Thomas's decision to plead. In order to protect the interests of Dorsey and Perkins, it was incumbent on Campbell to convince Thomas to plead guilty, even

though Thomas was reluctant and was not in the same situation as Dorsey or Perkins. As Thomas testified at sentencing, he did not shoot either of the victims. This testimony was corroborated by both Dorsey and Perkins, who admitted that they alone shot each of the victims. Thus, Thomas may not have shared the same interest in pleading guilty to charges of second degree murder as did Dorsey and Perkins. This was shown by Thomas' reluctance. His reluctance was overcome, however, upon the urging of Campbell to plead along with the other defendants. We find that Campbell's pressure, which was tainted by a conflict of interest, had an adverse impact on Thomas' decision to enter a guilty plea.''

The appellant strongly contends that Campbell's conflict had no adverse effect because even in Thomas would have been represented by separate counsel, that counsel would also have urged Thomas to plead in light of the state's strong evidence. Thus, the appellant essentially contends that in order to obtain habeas relief, Thomas must establish that but for the conflict of interest, Campbell would not have urged him to plead guilty and he would not have entered a plea. This argument is unpersuasive because it misstates the burden placed upon Thomas to prove his ineffectiveness claim. The burden of proof required under the appellant's argument would be tantamount to establishing actual prejudice under the

traditional Strickland test. Such proof is clearly not required. Rather, once an actual conflict is proven, a petitioner need only demonstrate an adverse impact on his counsel's performance, or, in this case, on his decision to enter a guilty plea. See Ruffin v Kemp, 767 F.2d 748, 752 (11thCir. 1985). Since the proper focus is solely on whether Campbell's conflict affected his actions and Thomas' decision. It is inappropriate to consider whether another attorney, untainted by a conflict of interest, would also have recommended that Thomas plead guilty.

We are also unpersuaded by the appellant's reliance on United States v Shaughnessy, 782 F.2d 118 (8th Cir. 1986). In that case, defendant Shaughnessy's attorney was hired by two

of Shaughnessy's codefendants, who had their own separate counsel. All codefendants pleaded guilty to one of two drug-related charges. Shaughnessy sought habeas relief on the ground that he was denied effective assistance of counsel due to a conflict of interest, but the Eighth Circuit found that there was neither an actual conflict of interest nor an adverse impact. While the court noted the inherent danger which exists when a criminal defendant is represented by counsel retained by a codefendant, it concluded that the danger did not ripen into an actual conflict under the circumstance. The court stressed that Shaughnessy's attorney had "vigorously represented Shaughnessy's interests" in pursuing several avenues which were particularly responsive to Shaughnessy's

personal and separate interests apart from his codefendants. id. at 120. The court also expressly rejected Shaughnessy's argument that a conflict of interest was shown because his attorney had advised him to present a united front with his codefendants by rejecting an offer of a reduced sentence. The court found that evidence of such advice by an attorney "is not, without more, proof of actual conflict of interest." Id. The appellant urges that Shaughnessy is analogous and supports denial of Thomas' habeas petition.

We disagree. While some of the statements in Shaughnessy, standing alone, seem applicable, the case viewed in its entirety is readily distinguishable. Shaughnessy's attorney

vigorously represented the individual interests of Shaughnessy, the attorney did not represent all of the codefendants, and there was no proof that the attorney pressured Shaughnessy into accepting a plea bargain which was contingent upon all of the codefendants pleading guilty. All of these facts are in contrast to the present situation, where Campbell was retained not by Thomas by but Dorsey and Perkins, where Campbell represented all of the codefendants, and where Campbell pressured a reluctant Thomas to accept the "all or nothing" plea bargain which Dorsey and Perkins had already stated their desire to accept. We believe that these factors render Shaughnessy inapposite and therefore unpersuasive.

In sum, we are of the opinion that Campbell's actual conflict of interest had an adverse impact on his representation and on Thomas' decision to plead guilty. Accordingly, we conclude that under these circumstances Thomas was denied effective assistance of counsel due to Campbell's conflict of interest. We therefore AFFIRM the judgment of the district court granting the writ of habeas corpus.

No. 86-1706

DAVID A. NELSON, Circuit Judge, dissenting. Because if does not seem to me that the petitioner has sustained his burden of proving that an actual conflict of interest adversely affected his lawyer's performance, I must respectfully dissent.

Petitioner's lawyer -- who testified that he might have participated in "more than five hundred" criminal matters--was unquestionably an experienced criminal attorney. The heinous crime committed by petitioner and his co-defendants had attracted considerable notoriety (it came to be known as the "911 case" because one of the victims had dialed that emergency number and left the phone off the hook, allowing the killings to be tape recorded by the police), and petitioner's lawyer was less than optimistic after picking the jury. "[T]hey looked at us like we were less than human," he testified, and "I was certain that all three would be convicted of first degree murder if the thing had proceeded to a culmination in front of a jury."

This lawyer's professional ethics may not have been above reproach, but I know of no reason to suppose that his judgment as to the probable outcome of the trial was anything other than informed and accurate.

If the lawyer's potential conflict of interest merely created a hypothetical inhibition to hypothetical plea negotiations, such a conflict cannot justify the very serious step we are asked to take here. Yet the record of this case, as I read it, contains no basis for supposing that another lawyer could have negotiated <u>any</u> plea agreement for the petitioner in return for his testifying against his co-defendant, much less a more favorable plea agreement than that actually arrived at when all three

defendants elected to plead guilty to charges of murder in the second degree.

At the evidentiary hearing conducted by the magistrate, Assistant Prosecutor Schigur testified that it was his policy in multiple defendant cases, not to accept guilty pleas from anyone unless all of the defendants pleaded guilty. "The only that I ever had," Mr. Schigur said, was that he sometimes accept a guilty plea from a defendant whom I had less evidence," going forward with the of the person against whom the evidence was stronger. But if the one against whom I had the stronger case wanted to plead guilty, leaving me to try the case against the weaker --the person against whom I had less evidence, I would not consider that."

Although the petitioner was carrying a gun when he broke into the victims' house, it is true that he denied having fired any shots, whereas the other defendants admitted to having done so. This does not mean, however, that Mr. Schigur believed he had a stronger case against the co-defendants than he had against the petitioner. On the contrary, Mr. Schigur testified that he felt he had just as strong a case against the petitioner as against co-defendant Dorsey, "but as to Mr. Perkins, who was arrested separately from the other two, and whose preliminary examination was conducted separately from the other two, my case against him, I felt, was substantial weaker...." (Emphasis supplied.) This means that Mr. Perkins might have had some basis for hoping to

be allowed to plead guilty by himself, but nothing in Mr. Schigur's testimony suggests in any way that he would have considered accepting a guilty plea from petitioner if Mr. Perkins and the third co-defendant had not pleaded guilty as well.

The deal cut by petitioner's counsel seems to have been an excellent one for all three of the defendants. Petitioner would doubtless have preferred to be acquitted, but that simply wasn't in the cards. I doubt that any competent attorney would have advised petitioner to take his chances on a trial before Judge Del Rio and a jury who looked at the defendants as though they were "less than human."

The inducement for each of the three defendants to plead guilty was a compelling one. As this court said in the case of Defendant Perkins--the defendant against whom the prosecution thought it had the weakest case--"...the actual inducement behind Perkins' plea was the realization, acknowledged by Perkins' [and petitioner's] trial counsel, that there was a strong likelihood that Perkins and his co-defendants would be convicted of first degree murder if they continued with their trial. Under Michigan law, a conviction for first degree murder requires a life-sentence without parole; a conviction for second-degree leaves open the possibility of parole."

Perkins v Mintzes, No. 83-1174 (6th Cir. 1984), slip op. at p. 4.

Possible in recognition of the fact that petitioner denied actually having pulled the trigger of his gun, Judge Del Rio sentenced petitioner to a lesser term than that received by the other defendants. Petitioner's sentence left open the possibility of parole, moreover, whereas there would have been no possibility of parole if he had been convicted of first degree murder--a denouement that his experienced counsel thought highly likely, absent a guilty plea.

Although the writ of habeas corpus granted in this case is a conditional

writ that permits the state of Michigan to schedule a new trial within 90 days, I question how strong a case the state could make at a new trial even if the evidence that existed more than a dozen years ago is capable of resurrection. Michigan abrogated its common law felony murder rule in 1980 (see People v Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), and the change in the law (a change that operates prospectively only) would seem to make a murder conviction rather less likely today than in was in 1975.

The practical effect of the writ may well be to return the petitioner to the streets, and I see no justification for a federal court doing that on the record before us.